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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ISSAC EFREN JIMENEZ et al., Defendants and Appellants.	2d Crim. No. B271066 (Super. Ct. No. 1430491) (Santa Barbara County)

Issac Efren Jimenez and Joseph Michael Castro appeal after a jury convicted them of first-degree special-circumstance gang murder (Pen. Code,[1] §§ 187, subd. (a), 189, 190.2, subd. (a)(22)) and conspiracy to commit murder (§§ 182, subd. (a)(1), 187). As to the murder, the jury also found true allegations that (1) appellants committed the crime while lying in wait (§ 190.2, subd. (a)(15)); (2) the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang

[1] All statutory references are to the Penal Code unless otherwise stated.

(§ 186.22, subd. (b)(1)(C)); and (3) in committing the murder appellants intentionally and personally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)). Appellants were each sentenced to life without the possibility of parole, plus an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). They were each also ordered to pay $30,719 in victim restitution.

Appellants each raise claims of evidentiary error and collectively challenge the lying-in-wait special circumstance findings. They also claim the judgments should be modified to reflect they are jointly and severally liable for the awards of victim restitution. In supplemental briefs, appellants contend they are entitled to a remand for resentencing pursuant to the recently-enacted section 12022.53, subdivision (h), which gives trial courts discretion to strike firearm enhancements in the interests of justice. We remand for the trial court to correct its victim restitution order and exercise its discretion whether to strike the firearm enhancements. Otherwise, we affirm.

STATEMENT OF FACTS

Prosecution

In February 2013, Castro was an active member of the Eastside Krazies, a clique or subset of Santa Barbara's Eastside gang. Jimenez, who lived in Ventura but often stayed in Santa Barbara, was friends with Castro and other Eastside members.

Jimenez was not an Eastside member but frequently associated with members of the gang, including Daniel Ybarra. On numerous occasions, Jimenez acted as a driver for Eastside members. He also went "gang-banging" with Ybarra and helped him commit auto burglaries, one of Eastside's primary criminal activities.

The victim, Kelly Hunt, was a member of Ventura's Midtown gang and its subset, the Crazy Winos. Hunt was a friend of Jimenez and met other Eastside members through him, including Castro and Ybarra.

On February 19, 2013, Jimenez drove Hunt to Santa Barbara to attend a party at Ybarra's house. Castro, Ybarra, and several other Eastside members, including Jose Castro (Jose),[2] were also at the party along with Ybarra's girlfriend Valeria Balcazar.

Ybarra suggested that the group play football at Ortega Park, an Eastside hangout. Ybarra and Jose walked to the park along with two or three other Eastside members. Jimenez drove to the park with Castro, Hunt, and Balcazar. When it began to rain, the group walked to Santa Barbara High School and drank alcoholic beverages in the parking lot. It was there that Castro told Ybarra Jimenez wanted to kill Hunt. Castro also asked Ybarra if he wanted to join him, Jimenez, and Hunt in stealing a car for which Castro had the key. Ybarra declined and said he was ready to go home.

Ybarra, Balcazar, and Jose left the school grounds and began walking up Olive Street, while appellants and Hunt began walking down Olive Street. No more than 30 seconds later, several gunshots rang out from the direction that appellants and Hunt had gone. Ybarra and Jose ran toward the sound of the shots and saw Hunt lying on the sidewalk. Appellants were standing further down the street. Ybarra and Jose ran back to Balcazar and all three continued walking up Olive Street.

Neighbors heard the gunshots and called 911. Paramedics arrived. They found Hunt with gunshot wounds to his chest,

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[2] Jose is unrelated to appellant Castro.

back, and upper arm, and he died from his injuries a short time later. Hunt had been shot from behind and the side with a .38-caliber revolver.

Ybarra and Balcazar took a bus to Ybarra's house. Castro was inside the house and was using a sock to wipe the fingerprints off a revolver. Jimenez was alone in the backyard and appeared to be nervous. Ybarra asked Castro what had happened and Castro replied, "Don't even worry about it, it had to happen." Castro later told Ybarra that he hid or buried the gun used to shoot Hunt. When Ybarra also asked Jimenez what had happened, Jimenez simply said he wanted a ride home. Appellants left the house together about 15 minutes later.

The next day, Hunt's mother called Jimenez's brother and asked him to have Jimenez call her. Jimenez said he would call but never did. Hunt's brother also called Jimenez on more than one occasion to see if he knew anything about Hunt's death, but Jimenez never returned the calls. The police tried to contact Jimenez over the next several days but were unable to do so. Jimenez did not attend Hunt's funeral.

On February 28, the police located Jimenez and accompanied him to the police station for an interview. Jimenez said he was at his grandparents' house on the night of Hunt's murder. He was asked if he would share the passcode to his cell phone and he declined. When the phone was later unlocked, it contained a note stating: "You give me a .9 mi in an alley I will retire that motherfucker."

Not long after Jimenez was interviewed, he went to live with an uncle in Sacramento. On March 13, Ybarra sent Jimenez a message on Facebook. Jimenez replied that he was in Sacramento with family. After they exchanged several additional

messages, Jimenez initiated a phone conversation. During that conversation, Jimenez told Ybarra he had to leave town because the police were looking for him at his mother's house in Ventura.

Jimenez briefly returned to Ventura in June or July. On July 13, he sent his brother a text message stating that he had moved to the state of Washington.

On August 6, 2013, Ybarra was arrested and charged in an unrelated incident with attempted murder and assault with a deadly weapon. Three days later, Ybarra told investigators what he had witnessed on the day of Hunt's murder and what Castro had told him about the crime. The prosecution subsequently agreed to dismiss Ybarra's attempted murder charge in exchange for his agreement to testify truthfully in the instant matter. Ybarra went on to plead guilty to assault with a deadly weapon and admitted great bodily injury and gang enhancement allegations.

On August 13, Jimenez was arrested in Washington and Castro was arrested at his home in Santa Barbara. In Jimenez's truck, the police found an empty handgun case and a hand-drawn map depicting Eastside's territory. In Castro's home, the police recovered a .38-caliber revolver and ammunition. It was subsequently determined that the weapon had not been used to shoot Hunt.

Castro was interviewed at the police station after his arrest. He initially claimed that he never left Ybarra's house on the night Hunt was killed, that he had never met Hunt, and that Hunt was not at Ybarra's party. He also claimed he had not seen Jimenez since high school, even after he was confronted with text messages indicating otherwise.

Later in the interview, Castro admitted that he knew Hunt and knew he was a Midtown and Crazy Winos member. He also admitted shooting Hunt and said he did so because Hunt had threatened to hurt or shoot an Eastside member. Two or three weeks before the murder, Hunt had pulled a knife or gun on him. Castro took the opportunity to kill Hunt that night because he knew that Hunt did not have the gun he usually carried. When asked if he regretted the shooting, he replied, "[i]t's just how it is" and added, "[i]t's whatever to me."

Santa Barbara Police Detective Ben Ahrens testified as a gang expert. The Eastside Krazies is a Sureno gang whose primary activities include murder, assault with a deadly weapon, and narcotics sales. At the time of Hunt's murder, Castro was an active member of the Eastside Krazies and Jimenez was an active participant. Detective Ahrens also opined that Hunt was killed for the benefit of the Eastside Krazies, and that committing such a crime enhances the reputation of the gang as well as the perpetrator's reputation within the gang.

Castro's Defense

Castro testified in his own defense. He was jumped into the Eastside Krazies when he was 15 years old and thereafter continued "putting in work" for the gang until he was arrested for Hunt's murder. On the day of the murder, Jimenez told Castro that Hunt was "tripping" and "talking about killing one of us or taking us out or that he was mad." As they were walking on Olive Street that night, Castro and Hunt were talking about the vehicle they planned to steal when Jimenez repeatedly shot Hunt from behind. Castro falsely confessed to the crime because his allegiance was to the Eastside Krazies and he did not want to inform on Jimenez. When they returned to Ybarra's house after

the murder, Jimenez urinated on his hands to remove the gunshot residue while Castro wiped the gun with a sock.

Richard Leo, a psychology professor, testified regarding false confessions and the factors that can lead to such confessions.

Jimenez's Defense

Juan Zavala was an older member of the Eastside Krazies. Zavala testified that in February 2013, Ybarra was in charge of and had influence over the younger members of the gang. A few days to a week after Hunt's murder, Ybarra told Zavala that members of the gang had met prior to the crime and had decided to kill Hunt. Ybarra said "they had already told [Hunt] to go [away] and he was still hanging around. So he didn't go, so they had to do something about it." Ybarra said "they were walking . . . from the high school . . . and that [Hunt] always carried a gun on him so that [Ybarra] took the opportunity and he shot him from behind."[3]

Rebuttal

A couple of months after the murder, Castro told Ybarra's brother Daniel that Jimenez shot Hunt because he had heard from Hunt's friends that Hunt was going to kill Jimenez.

DISCUSSION

I.

Castro's Confession

Castro contends the trial court erred in denying his motion to suppress his confession as involuntary. We disagree.

"'An involuntary confession is inadmissible under the due process clauses of both the Fourteenth Amendment to the federal

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[3] Ybarra denied telling Zavala or anyone else that he had shot Hunt.

Constitution [citation] as well as article I, sections 7 and 15 of the California Constitution [citation].' [Citation.] 'Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession.' [Citation.] '[C]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' [Citation.] '[T]he question in each case is whether the defendant's will was overborne at the time he confessed. [Citations.] If so, the confession cannot be deemed "the product of a rational intellect and a free will."' [Citation.] The burden is on the prosecution to show by a preponderance of the evidence that the statement was voluntary. [Citation] 'When, as here, the interview was [recorded], the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.'" (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1400–1401.)

"In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.] The question is whether the statement is the product of an "'essentially free and unconstrained choice'" or whether the defendant's "'will has been overborne and his capacity for self-determination critically impaired'" by coercion. [Citation.] Relevant considerations are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."'" (*People v. Williams* (2010) 49 Cal.4th 405, 436 (*Williams*).)

Castro, who was then 20 years old, was first interviewed at the police station by Detectives Brian Larson and Andy Hill. He

waived his *Miranda* rights at the outset of the interview and began confessing approximately five-and-a-half hours later. Detective Ahrens and two other gang investigators then spent an additional hour taking Castro's statements. Throughout the course of the day, Castro was given several lengthy breaks and was offered food and drink. On one occasion, he said he was cold and was given a sweatshirt to wear.

Before Castro confessed, Detective Larsen repeatedly told him that he could not make any deals or promises. Castro expressed his reluctance to be a "snitch" or a "rat." At one point, Detective Larson told Castro "Issac's been arrested for something that happened that night and he's talking about it. And he's talking about you. And he's saying some pretty serious stuff. Do you get where I'm going with this?" The detective went on to tell Castro, "you're putting yourself in a position where other people are gonna get to decide who is this Joseph guy and what should happen over the next years of his life. Understand I'm not threatening. I'm not making deals."

Detective Larson later told Castro: "Don't be the guy saying I wasn't there when everyone says you were there. . . . [D]on't burn up your future over Issac. Issac . . . doesn't have homies like you have homies. He doesn't have a girlfriend like you have a girlfriend. . . . [D]on't trade your fate for Issac's." The detective also made an analogy to the game of musical chairs and said, "I don't want you to be that guy without a chair when everyone else has an explanation. . . . I want you to have a voice for yourself." Castro went on to admit he was present on the night of the murder, but continued to deny knowing who had committed the crime. Detective Larson told Castro, "Don't give up 20 years of your life or whatever they would decide for Issac's

sake. . . . If you're going to go to prison go as a fucking killer. Go legit if you did it. If you didn't do it, go on with your life man. . . . I'm not going to call [your mother and girlfriend] and tell them you don't know what to do and you can't make a decision."

The detective later added, "You've got a lot of people looking up to you, man. . . . Your brother's doing the right thing when he looks up to you. . . . [W]hen he wants to know what a man would do in a situation, I'm pretty sure he looks at you. . . . You still need to show [your brother] today, what a man does. A man speaks up and tells the truth to protect his family, or a man takes credit for the things he's done. Why not tell man? God knows already anyway. . . . [A]t the end of the day, your mom needs you to be a son, and [your brother] needs you to be a man. . . . None of these other guys I've talked to have won coaching awards. . . . Joseph, it's time for us to be men. Own up to it. . . . We have a pretty good idea what happened, and everyone is gonna know what happened, no matter what you say. I would rather give you the benefit of owning it, because you deserve respect for the things you do do. And you also . . . deserve freedom for the things you don't do. So what I'm offering you is respect and freedom, but you have to take those things from me, Joseph. I don't want to see you leave disrespected and locked up."

Castro responded that he "can't say" what happened and added, "I'm not a rat, I can't." Detective Larson replied, "[I]f you end today deciding to not be a rat, you will regret it for the rest of your life, not just the time you would get - you're gonna regret it for all the years after that. . . . You have lots of futures available to you now, but when you choose to not be a rat, you throw away 1000 different futures for Joseph, and you cannot get them back."

Castro later asked Detective Larson what he would be charged with if he said what had happened. The detective responded, "I can't make those deals - I can only tell you that people have common sense. . . . I know you probably hate DA's and stuff, but deep down they have common sense, judges have common sense, juries have common sense. They're gonna look at you. They're gonna see a guy that goes through a hard emotional struggle because he has a strong sense of camaraderie and brotherhood with the homies, but he also loves his family and wants to be a good role model for this brother. . . . They're gonna know that it's not all your fault."

Immediately before Castro confessed, Detective Larson asked him: "[D]o you want to be gone for life, is that your goal? Is your whole goal to be like a legit prison homie 'til death? . . . [L]et's try not to die in there. . . . Enough of the stupid let's multiply the wrong - let's both get life terms or something just 'cause we're nuts, okay. . . . What did you do, so we can know the things you didn't do?' Castro then replied, "'Fuck, I did - I did everything."

Prior to ruling on Castro's motion to suppress, the court reviewed the entire videotape of his interview up to his confession. The court observed that at the beginning of the interview Castro appeared "very comfortable and very relaxed and not at all concerned" or "emotional." The court noted that although Detective Larson used a "mild" form of "psychological coercion," there had been no "direct promise of leniency" or "suggestion of physical abuse or physical coercion." The court further noted that later in the interview Castro appeared to be "only half listening" due to his "inner torment" about "not wanting to be characterized as a rat or a snitch."

Based on the totality of the circumstances, the court concluded that Castro confessed "not because his will [was] overcome by the statements made by Detective Larson" but rather "of his own free will." The court found that although the detective's statements "may have had some impact" on Castro, they were not "likely to produce the statements that are both involuntary and unreliable."

The court did not err. In contending to the contrary, Castro largely focuses on Dr. Leo's expert testimony at trial regarding the phenomenon of false confessions. As the People correctly note, however, none of that evidence was before the court when it ruled on the suppression motion.

Castro also asserts that during the interview Detective Larson "insinuated an accusation," "flooded [him] with . . . inducements, incentives and motivators" and "implied leniency." But nothing the detective said or did could be interpreted as unduly coercive so as to render Castro's confession involuntary. "'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." [Citation.]'" (*Williams*, *supra*, 49 Cal.4th at p. 436.) "It is well settled that law enforcement may confront a witness with what they know. [Citation.] They may also discuss any advantages that "'naturally accrue'" from making a truthful statement. [Citations.] They may explain the possible consequences of the failure to cooperate as long as their explanation does not amount to a threat contingent upon the witness changing [his or] her story. [Citations.] They may even engage in deception as long as

it is not of a type 'reasonably likely to produce an untrue statement.'" (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 79.)

None of Detective Larson's questions or statements ran afoul of these principles. He never threatened Castro and made no promises of leniency. Although the detective used psychological ploys, his tactics were not so coercive that it can be said they induced Castro to involuntarily confess. Because the totality of the circumstances demonstrate that Castro's confession was not the result of coercion, deception, or promise of leniency, but rather was given of his own free will, his motion to suppress the confession was properly denied. (*Williams*, *supra*, 49 Cal.4th at p. 436; *People v. Scott* (2011) 52 Cal.4th 452, 480.)

II.

Conflict of Interest

Jimenez contends the court erred in denying his pretrial motion to dismiss the charges or, alternatively, preclude Ybarra from testifying on the ground that attorney William Duval, who was then representing Ybarra in an unrelated criminal proceeding, had briefly represented Jimenez in the instant matter prior to his arraignment. He argues that the motion should have been granted because Duval's successive representation of himself and Ybarra created an irreparable conflict of interest and thereby violated his constitutional right to counsel. We conclude otherwise.

"Professional ethics demand that an attorney avoid conflicts of interest in which duties owed to different clients are in opposition. [Citations.] A conflict of interest may arise from an attorney's concurrent or successive representation of clients with adverse interests. [Citation.]" (*People v. Baylis* (2006) 139 Cal.App.4th 1054, 1064.) "When a conflict arises out of the

successive representation of a former and a current client, disqualification turns on whether there is a substantial relationship between the former representation and the current representation. [Citations.] 'Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory . . . .' [Citation.] A substantial relationship is said to exist when it appears, by virtue of the nature of the former representation or the relationship of the attorney to his former client, that confidential information material to the current representation 'would normally have been imparted to the attorney.' [Citation.]" (*Id.* at p. 1066, italics omitted.) In determining whether such a relationship exists, "[t]he court should focus on the similarities in the facts involved in the two representations, the legal questions posed, and the nature and extent of the attorney's involvement in each case. [Citation.]" (*Ibid.*)

Jimenez was arrested in Washington state on August 13, 2013. At the request of Jimenez's mother, Duval spoke to Jimenez on the telephone in Washington sometime prior to his arrest. On August 15, when the first amended felony complaint was filed, Jimenez was represented in court by a public defender. On August 19 and 27, Duval appeared in court on Jimenez's behalf and requested continuances of his arraignment. On August 30, Jimenez retained attorney Ilan Funke-Bilu to represent him in the proceedings.

In the meantime, on August 6, 2013, Ybarra was arrested and charged in an unrelated matter with attempted murder and assault with a deadly weapon. When Ybarra gave statements to the police on August 9, he had no legal representation. When he appeared for arraignment on August 13 and 14, he was represented by public defenders and each time the arraignment was continued. On August 19, Duval appeared on Ybarra's behalf and the arraignment was once again continued. Duval was officially retained to represent Ybarra and thereafter continued to represent him throughout the proceedings. In April 2014, Ybarra signed a letter in which he agreed to testify truthfully for the prosecution in the instant matter. In exchange for this agreement, the prosecution allowed Ybarra to plead guilty to assault with a deadly weapon with great bodily injury and gang enhancements and a maximum sentence of 14 years in state prison.

Duval testified at the hearing on Jimenez's motion. He acknowledged speaking on the phone with Jimenez on one occasion prior to his arrest, and with Jimenez's mother sometime prior to that. Duval had no recollection of receiving any confidential information from either Jimenez or his mother. When he spoke to Jimenez and his mother on the phone, he was led to believe that Jimenez might be a witness to a murder.

Although Duval appeared in court on Jimenez's behalf on two occasions, he was never actually retained to represent him and did not believe he ever had a conversation with him about the facts of the case. Duval's normal practice would have been to simply tell Jimenez not to discuss the case with anyone. He characterized the nature and scope of his representation of Jimenez as "a holding action where there was a criminal

defendant . . . charged with very, very serious charges and I wanted to make sure that that defendant did not say anything to anybody about that case until the question of representation had been established."

On August 26, 2103, Duval received discovery in Jimenez's case. He subsequently forwarded the discovery to Funke-Bilu.

Funke-Bilu also testified at the hearing. Two days after he was retained to represent Jimenez, he spoke to Duval on the phone. Funke-Bilu asserted that he and Duval discussed the facts of the case and that Duval made clear he was familiar with the contents of the 890 pages of discovery he had received. Funke-Bilu acknowledged, however, that the discovery primarily consisted of lists and reports of bystander witnesses who were near the scene of the crime. Under questioning by the court, Funke-Bilu admitted "I cannot as I sit here right now articulate what I believe is confidential information that was disclosed to Mr. Duval . . . ."

After hearing argument from the parties, the court denied Jimenez's motion. The court found that although there had been an attorney-client relationship between Jimenez and Duval, Duval's subsequent representation of Ybarra did not create a conflict of interest because there was no substantial relationship between the former and current representation. The court noted, among other things, that "[t]here were very few contacts" between Jimenez and Duval and that their relationship "never got past the arraignment stage." The court added "I'd be extremely surprised if an Appellate Court looking at this record . . . would say that their relationship was substantial requiring the sort of presumption that attaches when there is a substantial relationship between an attorney and a client."

We agree with the trial court's conclusion. *People v. Thoi* (1989) 213 Cal.App.3d 689 (*Thoi*), is instructive. The defendant in that case, a medical doctor, was convicted on multiple counts of Medi-Cal fraud and other offenses. (*Id.* at p. 692.) Before he had been arrested, his fiancée, a pharmacist, was arrested along with several other doctors and drivers. On two separate occasions, the defendant consulted with attorney Becky Dugan about representing his fiancée. In the course of those conversations, the defendant told Dugan he feared being arrested and that he had some blank prescription pads. According to Dugan, however, he did not convey any incriminating information or anything else which would have led her to believe he would be charged. Dugan promised him she would help him if he was charged, but he never retained her. Dugan went on to represent two of the defendant's drivers and arranged for one of them to testify against the defendant pursuant to a plea bargain. (*Id.* at p. 698.)

Prior to trial, the defendant moved to preclude the driver from testifying on the ground that Dugan had a conflict of interest. (*Thoi*, *supra*, 213 Cal.App.3d at p. 698, fn. 7.) In affirming the denial of that motion, the Court of Appeal reasoned that although the defendant and Dugan's "encounters were sufficient to give rise to the attorney-client privilege [citations], there is no suggestion that Dugan would ever be called upon to testify against [the defendant]. The real question is whether after the chats with [the defendant], she was precluded from representing the drivers who testified against him. We hold that a substantial relationship must exist before such a bar would arise. [Citation.] There was none here." (*Id.* at p. 699.)

The court in *Thoi* further reasoned that "[e]ven if we found an attorney-client relationship arose from these brief encounters,

the result would not change. The evil inherent in representing multiple persons in a related matter is that the attorney might use confidential information from one client against another. In the absence of such information, the harm is speculative." (*Thoi*, *supra*, 213 Cal.App.3d at pp. 699-700.) The court went on to note that "Dugan's testimony established that nothing in her conversations with [the defendant] in any way assisted her representation of the drivers or contributed to his conviction. Her representations as an officer of the court are accepted in the absence of proof to the contrary. [Citation.]" (*Id.* at p. 700.)

Here, Duval spoke to Jimenez and his mother on the telephone before he was arrested. At the time of those communications, Duval was given the impression that Jimenez might be a witness to Hunt's shooting; there was no suggestion he might actually have committed the crime. Although Duval went on to appear for Jimenez on two separate occasions after he was arrested, he merely did so to request continuances of the arraignment and was never actually retained to represent him. Duval also received and apparently reviewed some discovery that primarily focused on bystander witnesses to the crime. Duval made clear, however, that he did not recall receiving any confidential information about the crime from either Jimenez or his mother. He also "absolutely" denied conveying any such information to Ybarra or the prosecution. As Duval put it, he appeared for Jimenez as a "holding action" and would have simply advised him not to "say anything to anybody about [the] case until the question of representation had been . . . answered."

Given this evidence, Jimenez cannot establish that Duval's brief representation of him was of such a nature that he would normally have conveyed confidential information material to

Duval's representation of Ybarra in an unrelated proceeding. Jimenez thus failed to show the requisite substantial relationship between the prior and current representations. (*People v. Baylis*, *supra*, 139 Cal.App.4th at p. 1066.) Accordingly, his conflict of interest claim was properly denied. (*Ibid.*)

III.

Detective Ahren's Expert Gang Testimony

a. Sanchez

Jimenez contends the court prejudicially erred in allowing Detective Ahrens to testify to inadmissible hearsay in violation of his federal confrontation rights and state evidentiary rules, as set forth in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). We are not persuaded.[4]

In *Sanchez*, our Supreme Court held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Accordingly, to be admissible the statements must either be independently proven

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[4] The People contend that Jimenez forfeited his claim by failing to timely object below. Jimenez responds that there was no forfeiture because the California Supreme Court issued *Sanchez* after he was convicted and sentenced. The Courts of Appeal have reached differing conclusions on this issue (*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72, fn. 7 (*Veamatahau*) [collecting cases]), and it is currently before our Supreme Court (*People v. Perez* (2018) 22 Cal.App.5th 201, review granted July 18, 2018, S248730.) Pending further guidance from the Supreme Court, we find the opinions declining to find forfeiture persuasive. (See *People v. Flint* (2018) 22 Cal.App.5th 983, 996-998; *Conservatorship of K.W. (*2017) 13 Cal.App.5th 1274, 1283; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507-508).)

or fall under a hearsay exception. (*Ibid.*) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) When a prosecution expert in a criminal case seeks to relate testimonial hearsay, as contemplated in *Crawford v. Washington* (2004) 541 U.S. 36, there is a confrontation clause violation unless (1) the declarant is unavailable, or (2) the defendant either "had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686.)

Jimenez first takes issue with Detective Ahren's testimony regarding Philip Rendon, who was listed as Jimenez's Facebook "friend." In opining that Rendon was affiliated with the Eastside gang, the detective relied upon his personal knowledge, read police reports, and considered communications he had seen between Rendon and another Eastside member. In opining that Jimenez was an active participant in the Eastside Krazies, Detective Ahrens relied in part on evidence that several other members or affiliates of the gang are listed as Jimenez's Facebook friends. The detective added that he had also reviewed field interview documents and text messages showing contact between Jimenez and another Eastside member.

To the extent Detective Ahrens's testimony was based on his personal knowledge and observations, it was not hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 685 [expert witnesses "can rely on information within their personal knowledge"]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248.) Nor did the detective fun afoul of *Sanchez* by merely conveying that he relied upon evidence that may contain hearsay. (*Sanchez*, at p. 685, italics omitted ["Any expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so"].)

Moreover, the prosecution presented independent, documentary evidence of Jimenez's Facebook friends. Detective Ahrens thus did not run afoul of *Sanchez* by relying on this evidence. (*Id.* at pp. 685-686.)

Jimenez also faults Detective Ahrens for testifying regarding a March 2011 hit-and-run incident involving an abandoned car that was registered to Jimenez's father. The detective searched the car and found a drawing of a tattooed gang member, half a pound of marijuana, and pay-owe sheets. When Detective Ahrens searched Jimenez's house the following day, Jimenez admitted the marijuana was his. Ammunition for a .357-caliber firearm was also found in the house. When Jimenez's truck was searched following his arrest, the police also found a drawing with a prominent display of the letter "K," a symbol used by the Eastside Krazies.

As the People correctly note, Detective Ahrens's testimony regarding the March 2011 incident was offered for the nonhearsay purpose of explaining how the detective came to discover the evidence of appellant's criminal and gang activity. Similarly, the pay-owe-sheets and drawings found in Jimenez's possession were not hearsay because they were not offered for the truth of any matter asserted therein. (See *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1222-1226.)

Jimenez next complains that Detective Ahrens considered evidence of a "roll call," i.e., a roster identifying Sureno gang members currently housed in a particular penal facility. The document, which was recovered from the county jail cell of a Sureno gang member, includes Jimenez's name, his moniker "S-Black," and his "hood" of Ventura. The evidence was not testimonial hearsay because it was not prepared for the purpose

of preserving facts for later use at a trial. (*Sanchez*, *supra*, 63 Cal.4th at p. 689.) To the extent that the evidence of Jimenez's moniker and the "hood" conveyed nontestimonial hearsay in violation of state evidentiary rules, the error was harmless because it is not reasonably probable that appellant would have achieved a more favorable result had the evidence been excluded. (*Id.* at p. 698; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Finally, Jimenez argues that Detective Ahrens violated *Sanchez* by relying on certified records of prior convictions suffered by other Eastside members to support his opinion that the Eastside Krazies had engaged in the requisite "pattern of criminal activity" as set forth in section 186.22, subdivision (b). This argument fails because *Sanchez* does not preclude expert testimony about gang predicate offenses. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174-1175.) A gang expert may testify about general background matters such as the gang's operations, primary activities, pattern of criminal activities, and predicate offenses even if it is based on hearsay sources. (*Ibid.*)

Even assuming that Detective Ahrens testified in violation of *Sanchez*, the error would not compel reversal of Jimenez's conviction. There was ample independent evidence that Jimenez was an active participant in the Eastside Krazies and that the crime was carried out to further the gang's activities. In light of this evidence, any *Sanchez* error was harmless regardless of the standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710,711]; *Watson*, *supra*, 46 Cal.2d at p. 836.)

b. *Active Gang Participant*

Jimenez asserts the court erred in allowing Detective Ahrens to opine that Jimenez was an active participant in the

Eastside Krazies. He claims "[w]hether [he] was an 'active participant' in the Eastside Krazies was not a proper subject for expert opinion because the jury was as competent as the expert witness to weigh the evidence and arrive at a conclusion on the issue." He further contends the opinion "also constituted impermissible profile evidence."

Jimenez did not object when the challenged testimony was offered. Accordingly, his claim is forfeited. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) In any event, it is not improper for a gang expert to offer an opinion regarding a defendant's gang participation, even if that opinion embraces an ultimate issue of fact to be decided in the case. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Moreover, given the ample independent evidence that Jimenez was an active participant in the gang, it is not reasonably probable he would have achieved a more favorable result had Detective Ahren not so opined. Accordingly, any error in admitting the opinion was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

IV.

Evidence of Jimenez's Facebook Friends

Jimenez claims the court abused its discretion in admitting evidence of the "friends" list from his Facebook profile (the list). He asserts that the evidence lacked foundation and contained inadmissible hearsay.

Contrary to appellant's assertion, he did not object on hearsay grounds to the list. His claim that the evidence was inadmissible hearsay is thus forfeited. In any event, the list was not hearsay—much less testimonial hearsay, as Jimenez claims —because it was not offered for the truth of any matters asserted therein. (*People v. Price* (1991) 1 Cal.4th 324, 437, superseded by

statute on other grounds as stated in *People v. Hicks* (1997) 58 Cal.App.4th 1157, 1161.)

Jimenez's lack of foundation claim is also unavailing. The list, for foundational purposes, is a "writing" subject to authentication by "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." (Evid. Code, §§ 250, 1400.) "The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.)

Jimenez's did not challenge the authenticity of the list; on the contrary, he stipulated to an adequate foundation for the evidence, which was produced by subpoena through Facebook's custodian of records. Instead, counsel asserted that the evidence should not be admitted "without some support, some . . . communication, some posting to show they're more than just, quote, Facebook friends." Counsel offered that "I get along with all of my Facebook friends, but that doesn't mean that you can draw any inference more than that. . . . [B]eing a Facebook friend is not like being a friend. It's a new cultural phenomenon and it's a new definition of the word 'friend.' . . . I think it's dangerous to just say, well, they're Facebook friends and, therefore, they're, quote, friends and that shows association. I think that's too tenuous."

This objection, which challenges the relevancy of the list to prove that Jimenez associated with Eastside members and was an active participant in their gang, is insufficient to preserve his claim on appeal that the evidence was also unauthenticated. His contention that the list was not properly authenticated is thus forfeited as well.

In any event, there is nothing to establish that the challenged evidence is not what it purports to be, i.e., a list of Jimenez's Facebook friends. Moreover, any conflicting inferences to be drawn regarding the list's authenticity would go to the weight of the evidence rather than its admissibility. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.) The same is true of any conflicting inferences regarding the probative value of the evidence.

Even if the evidence was erroneously admitted, it is not reasonably probable that Jimenez would have achieved a more favorable result had the evidence been excluded. Accordingly, the error would be harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Chism* (2014) 58 Cal.4th 1266, 1298 [erroneous admission of evidence is reviewed under the *Watson* standard].)

V.

Lying in Wait Special Circumstance Findings

a. *Cruel and Unusual Punishment*

Appellants contend their LWOP sentences constitute cruel and unusual punishment in violation of the Eighth Amendment because the lying-in-wait special circumstance upon which the sentences are based (§ 190.2, subd. (a)(15)) is virtually indistinguishable from first-degree murder committed by means of lying in wait (§ 189, subd. (a)). Our Supreme Court, however, has repeatedly rejected this contention. (See, e.g., *People v.*

Streeter (2012) 54 Cal.4th 205, 253, and cases cited therein.) As appellants concede, we are bound to follow this authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

b. *Sufficiency of the Evidence*

Appellants also contend the evidence is insufficient to support the lying-in-wait special circumstance findings. We disagree.

"A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction. [Citation.] Reviewed in the light most favorable to the judgment, the record must contain reasonable and credible evidence of solid value, 'such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Stevens* (2007) 41 Cal.4th 182, 201 (*Stevens*).)

"The lying-in-wait special circumstance requires an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . . The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*People v. Moon* (2005) 37 Cal.4th 1, 22 [internal quotation marks and citations omitted].) No precise period of time is necessary to prove the second element; the period of time need only be substantial. (*Id.* at p. 23.)
"The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.'" (*Stevens*, *supra*, 41 Cal.4th at p. 202.)

Substantial evidence supports each element of the lying-in-wait special circumstance findings. Appellants' arguments to the contrary give short shrift to the standard of review, which requires us to view the evidence in the light most favorable to the judgment. (*Stevens*, s*upra*, 41 Cal.4th at p. 201.) The evidence, when so viewed, demonstrates that appellants concealed their purpose by inducing Hunt to believe the three of them were merely going to steal a car. Moreover, appellants waited to kill Hunt until they had separated from the others and were alone with him on a dark street. Castro also told the police he knew that Hunt, who usually carried a firearm in his waistband, had left his weapon in Jimenez's car that night. Finally, Hunt was shot from behind without any warning, "thereby denying [him] any chance of escape, aid, or self-defense." (*People v. Johnson* (2016) 62 Cal.4th 600, 636-637.)

VI.

Victim Restitution - Joint and Several Liability

Appellants were each ordered to pay a total of $30,719 in victim restitution. Appellants contend, and the People concede, that the abstracts of judgment should be modified to reflect they are jointly and severally liable for the award of victim restitution. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.)

VII,

Senate Bill 620

After the briefs were filed, appellants filed supplemental briefs contending they are entitled to resentencing pursuant to Senate Bill 620, which the Governor signed on October 11, 2017. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to

strike enhancements for crimes in which a firearm was personally and intentionally discharged causing death. (§ 12022.53, subds. (b), (c), (d), & (e)(1)). Subdivision (h) of section 12022.53 now states that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

The People concede that the new law applies retroactively to defendants, like appellants, whose judgments were not final as of January 1, 2018. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) The People also concede that a remand for resentencing is warranted because the record does not clearly indicate that the court would not have stricken the enhancements at issue here had it known it had the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) "Although we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.53, subdivision (h), we do conclude that the trial court must exercise this discretion in the first instance." (*People v. Watts* (2018) 22 Cal.App.5th 102, 119.)

DISPOSITION

The matter is remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h). On remand, the court also shall modify the judgments to reflect that appellants are jointly and severally liable for the restitution orders. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

TANGEMAN, J.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

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